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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PENNZOIL COMPANY, *et al.*,
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether a court of appeals may use a motion filed under the All Writs Act as a method of circumventing the statutorily prescribed procedures for review of agency orders.

2. Whether the court of appeals, by ignoring the statutory procedures governing orderly judicial review, has contravened the mandate of Section 506(a) of the Natural Gas Policy Act, 15 U.S.C. § 3416(a), and of 28 U.S.C. § 2112, which require review of orders of the Federal Energy Regulatory Commission on the record and preclude piecemeal review of such orders in different courts of appeals.

3. Whether the court of appeals, in circumventing statutory procedures and reviewing only one aspect of an agency order and leaving all other aspects of that order subject to review in a separate proceeding in a separate court of appeals, denied petitioners here their due process rights to be heard at a meaningful time and in a meaningful manner.

4. Whether the court of appeals impermissibly intruded upon the discretion of the Federal Energy Regulatory Commission to prescribe refund remedies and, without the benefit of the complete agency record, vacated refund procedures prescribed by that agency to effect such remedies.

LIST OF PARTIES TO THE PROCEEDING

The petitioners filing in this petition for a writ of certiorari are: Amoco Production Company; ARCO Oil and Gas Company, Division of Atlantic Richfield Company; Champlin Petroleum Company; Chevron U.S.A. Inc.; Cities Service Oil and Gas Corporation; CONOCO Inc.; Exxon Corporation; Gulf Oil Corporation; Mobil Oil Corporation; Mobil Oil Exploration & Producing Southeast Inc.; Mobil Producing Texas & New Mexico Inc.; Pennzoil Company; Phillips Oil Company; Phillips Petroleum Company; Placid Oil Company; Shell Offshore Inc.; Shell Western E&P Inc.; Sun Exploration and Production Company; Tenneco Oil Company; Texaco Inc.; The Superior Oil Company; and Union Oil Company of California.*

The respondents are American Iron and Steel Institute; American Paper Institute, Inc.; Associated Gas Distributors; El Paso Natural Gas Company; Interstate Natural Gas Association of America; Laclede Gas Company; Lone Star Gas Company; Louisiana Land & Exploration Company; Michigan Wisconsin Pipeline Company (now ANR Pipeline Company); Mississippi River Transmission Corporation; Natural Gas Pipeline Company of America; Northern Natural Gas Company; Process Gas Consumers Group; Texas Gas Transmission Corporation; Transcontinental Gas Pipeline Corporation; United Gas Pipe Line Company; Valero Transmission Company; and the Federal Energy Regulatory Commission.

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* Pursuant to Sup. Ct. Rule 28.1, a list of all parent companies, subsidiaries (other than wholly-owned subsidiaries), and affiliates of Petitioners is included in the Appendix at 153a-165a. This list is limited to entities with stock or debt securities publicly traded in the United States or Canada.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-———

PENNZOIL COMPANY, *et al.*,
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Pennzoil Company, *et al.* ("Producers") pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit in Nos. 81-1690, *et al.*, entered on March 5, 1985.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-15a) is reported at 756 F.2d 166 (D.C. Cir. 1985). The orders denying rehearing (App. 132a-135a (Scalia, J., dissenting)) and suggestions for rehearing *en banc* (App. 136a (Bork, Tamm, and Wright, J.J., not participating)) are not reported.

The orders of the Federal Energy Regulatory Commission ("FERC") (App. 16a-80a and 81a-126a) are re-

ported at 49 Fed. Reg. 37735 (Sept. 26, 1984) and 49 Fed. Reg. 46353 (Nov. 26, 1984).[1]

JURISDICTION

The judgment of the court of appeals (App. 130a-131a) was entered on March 5, 1985. The court of appeals denied petitions for rehearing on May 6, 1985 (App. 132a-135a (Scalia, J., dissenting)) and suggestions for rehearing *en banc* on May 15, 1985 (App. 136a (Bork, Tamm, and Wright, J.J., not participating)).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982) and 15 U.S.C. § 3416(a)(4) (1982).

STATUTES

Sections 506(a) and (b) of the Natural Gas Policy Act (NGPA), 15 U.S.C. §§ 3416(a) & (b) (1982), govern judicial review of FERC orders issued under the NGPA; those provisions are set forth at App. 141a-144a.[2] The All Writs Act, 28 U.S.C. § 1651 (1982), and 28 U.S.C. § 2112 (1982) also are germane to the instant case and are reproduced at App. 144a-148a.

The regulations affected by the decision of the court of appeals below are set forth at App. 53a-56a, 120a.

STATEMENT OF THE CASE

This case involves an instance in which a court of appeals utilized a motion filed under the All Writs Act to effect judicial review. In so doing, it undertook premature review at the request of a party that had no statutory standing to invoke the jurisdiction of the court as to issues that were not ripe for judicial review.

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[1] *Refunds Resulting From Btu Measurement Adjustments*, Order No. 399, 49 Fed. Reg. 37735 (Sept. 26, 1984), *on reh'g*, Order No. 399-A, 49 Fed. Reg. 46353 (Nov. 26, 1984), *petitions for review pend'g sub nom. Mobil Oil Exploration & Producing Southeast Inc., et al. v. FERC*, No. 84-4775 (5th Cir.).

[2] The NGPA is codified at 15 U.S.C. §§ 3301-3432 (1982).

The orders reviewed by the court of appeals arose in the aftermath of the D.C. Circuit's decision in *Interstate Natural Gas Association of America v. FERC* (*"INGAA I"*).[3] There, the court of appeals vacated FERC's regulation allowing the heat (Btu) content of natural gas to be determined on a "dry" basis for purposes of applying the maximum lawful prices prescribed in Sections 102-109 of the NGPA, 15 U.S.C. §§ 3312-3319.[4]

Thereafter, the FERC amended its regulations in accordance with the court's order;[5] no challenge to that amendment is presented here. The FERC also issued Order No. 399, directing that producers make refunds of any amounts collected pursuant to its vacated regulations.

Pursuant to Section 506(a)(2) of the NGPA, 15 U.S.C. § 3416(a)(2), various parties, including Producers, filed applications for rehearing of Order No. 399. Producers objected to, *inter alia*, the method adopted by the FERC for effecting refunds and the procedure for

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[3] 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, —— U.S. ——, 104 S. Ct. 1615 (1984), *vacating in part Final Rules For Part 270, et al.*, 45 Fed. Reg. 49077 (July 23, 1980) (Order No. 93), *on reh'g*, 46 Fed. Reg. 24537 (May 1, 1981) (Order No. 93-A), *reh'g denied*, 47 Fed. Reg. 614 (Jan. 6, 1982).

[4] 716 F.2d at 4, 16. The NGPA prescribes maximum lawful prices on heat content basis, *i.e.*, in amounts per "MMBtu" (million Btu's). A question arose whether, for applying the NGPA's maximum lawful prices, the heat content should be determined on the "wet" (water saturated) basis used to adjust ceiling rates established under the Natural Gas Act or on a "dry" basis, which reflected the actual, higher Btu content of the gas when delivered. In Order No. 93, the FERC concluded that the Btu content of gas should be determined on the "dry" basis. The court of appeals reversed the FERC, holding that the "wet" method must be employed.

[5] *Interpretative Rule For Btu Measurement Standard Under The Natural Gas Policy Act of 1978*, 49 Fed. Reg. 3072 (Jan. 25, 1984) (Order No. 356).

calculating the amount of those refunds. Respondent Associated Gas Distributors ("AGD") did not file an application for rehearing of Order No. 399.[6]

In Order No. 399-A, the FERC denied in part and granted in part the applications for rehearing that had been filed by the Producers and others. The FERC granted these applications for rehearing in part by providing that Btu refund obligations could be offset against sum-certain debts owed to producers under rulemaking orders prescribing adjustments to applicable maximum lawful prices for production-related costs.[7] In so acting, the FERC did not reduce the refund obligations; rather, it provided more flexible procedures for satisfying those obligations by permitting offsets of mutual debts in lieu of cash transfers. App. 90a-91a, 106a.

On the day that Order No. 399-A was issued, Mobil Oil Exploration & Producing Southeast Inc., one of the Producers, filed a timely petition for review of Order Nos. 399 and 399-A with the Fifth Circuit. *Mobil Oil Exploration & Producing Southeast Inc. v. FERC*, No. 84-4775 (5th Cir.) (*"Mobil"*). No party disputes that Mobil's petition was the first timely filed petition for review of Order Nos. 399 and 399-A; indeed, the court of appeals below acknowledged this in its opinion. App. 9a.

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[6] AGD is an informal association of approximately forty local distribution companies that sell and distribute natural gas in the eastern United States. AGD's members purchase most of their supplies of natural gas from interstate pipelines, which, in turn, purchase most of their supplies from numerous sellers, including Producers.

[7] In a series of rulemakings, the FERC adopted regulations implementing Section 110 of the NGPA, 15 U.S.C. § 3320 (1982). Under those regulations, producers are entitled to collect from their purchasers reimbursement for "production related costs" as an addition to the maximum lawful price.

On the next day, AGD filed with the D.C. Circuit a "Motion for Order Directing Compliance with Mandate" ("Motion"). In its Motion, AGD argued that the offset mechanism adopted in Order No. 399-A constituted a refusal by the FERC to implement the mandate of that court of appeals in *INGAA I*. AGD urged the court of appeals to exercise its extraordinary power under the All Writs Act, 28 U.S.C. § 1651 (1982), to issue a writ of mandamus directed against the FERC to compel it to implement what AGD viewed as the mandate of the court of appeals in the earlier case.

When it filed its Motion, AGD had not applied for rehearing of either Order No. 399 or Order No. 399-A. Thereafter, AGD filed with the Commission a timely application for rehearing of Order No. 399-A. The FERC then issued an order granting, *inter alia*, AGD's and other applications for rehearing for purposes of further consideration.[8] App. 127a-129a. Notwithstanding that its application for rehearing was then still pending before the FERC, AGD on January 18, 1985 filed a petition for review of Order No. 399-A in the D.C. Circuit.[9]

Producers, the Interstate Natural Gas Association of America, and the FERC filed responses in opposition to AGD's Motion before the D.C. Circuit. In their responses, they addressed the lack of merit of AGD's re-

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[8] Such an order tolls the statutory time established for denying rehearing and is not a final, reviewable order. *See, e.g., California Co. v. FPC*, 411 F.2d 720 (D.C. Cir. 1969).

[9] *Associated Gas Distributors v. FERC*, No. 85-1043 (D.C. Cir.). Conoco Inc., one of the parties to the proceedings before the Commission, the D.C. Circuit, and the Fifth Circuit, filed a motion in the D.C. Circuit, pursuant to 28 U.S.C. § 2112 (1982), to transfer AGD's petition to the Fifth Circuit where the first petition for review of Order No. 399-A had been filed by Mobil. On May 17, after denying rehearing, the court of appeals dismissed AGD's petition for review as duplicative of AGD's Motion, which was the subject of the March 5 opinion.

quest for a mandamus against implementation of the offset mechanism. The court of appeals never requested full briefing on the merits of all challenges to Order Nos. 399 and 399-A. Further, the court of appeals gave no notice that AGD's Motion would be treated as a petition for judicial review rather than as an emergency motion under the All Writs Act. Nor had the agency record been filed with the court, a prerequisite to judicial review under Section 506(a)(4) of the NGPA.[10]

On March 5, 1985, the court of appeals acted upon AGD's Motion and issued a decision vacating the offset refund mechanism of FERC Order No. 399-A. *Interstate Natural Gas Association of America v. FERC*, 756 F.2d 166 (D.C. Cir. 1985). App. 1a-15a. Therein, the court of appeals did not address the merits of AGD's Motion under the All Writs Act. Rather, it determined that it would treat AGD's Motion as a petition for judicial review of Order No. 399-A under Section 506(a) of the NGPA, stating:

> We need not enter the debate over the propriety of resort to mandamus in this case, because, in any event, Associated Gas Distributors' motion to enforce the mandate may be treated as a petition to review that order.
>
> . . . .
>
> . . . Because the parties to the instant case have amply addressed the merits, no one will be prejudiced by considering Associated Gas Distributors' motion to enforce the mandate as a petition for review.

App. 9a, 11a.

Timely petitions for rehearing and suggestions for rehearing *en banc* were filed by Producers, the Interstate

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[10] The FERC had not filed the record with a court of appeals because the Fifth Circuit—the court of first filing—had deferred the filing of the agency record pending the D.C. Circuit's disposition of AGD's All Writs Act motion. App. 137a.

Natural Gas Association of America, and the FERC. On May 6, 1985, the panel denied those petitions in a *per curiam* order. App. 132a & 135a. Circuit Judge Scalia, who had originally concurred in the opinion of the court, withdrew his concurrence and entered a dissent in its place. In his dissent, Judge Scalia concluded that a writ of mandamus did not lie because the mandate of the court in *INGAA I* did not prescribe a particular refund mechanism, leaving the manner of effecting refunds to the FERC's discretion; that the petition for writ of mandamus could not be treated as a petition for review because AGD had not met the express and unequivocal statutory prerequisites to its seeking judicial review, as set out in NGPA Section 506(a)(2); and that if the petition for a writ were treated as a valid petition for review, it had to be transferred to the Fifth Circuit, where the first petition for judicial review of the orders had been filed. App. 133a-135a.

Thereafter, on May 15, 1985, the court of appeals denied the suggestions for rehearing *en banc*. App. 136a. Circuit Judges Wright, Tamm and Bork did not participate in the consideration of the suggestions for rehearing *en banc*.

On July 18, 1985, the FERC issued Order No. 399-B, attached hereto as a supplemental appendix. In that Order, issued in response to the D.C. Circuit's opinion, the FERC granted AGD's application for rehearing of Order No. 399-A. On that same day, one of the Producers, Mobil Producing Texas & New Mexico Inc., filed the first timely petition for review in the Fifth Circuit in No. 85-4485.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals subverts the integrity of the prescribed statutory procedure for obtaining judicial review of FERC orders issued under the NGPA, as well as under the Natural Gas Act and the Federal Power Act. These statutes require a party to file an

application for rehearing with the FERC and to have it denied, at least in part, as jurisdictional prerequisites to that party seeking judicial review. Thus, these statutes give the FERC the first opportunity to address a party's objections to its orders before a court of appeals may consider that party's petition for review.

Upon the filing of a petition for judicial review, further statutory provisions govern venue as between the several courts of appeals. Pursuant to 28 U.S.C. § 2112 (a), the agency "shall file the record in that [court] in which a proceeding with respect to [the agency's] order was first instituted." The filing of the full agency record with a particular court of appeals, under Section 506(a) of the NGPA, as well as equivalent provisions of the Natural Gas Act and the Federal Power Act, vests that court with exclusive jurisdiction and venue to review the agency's order, which review must be had on the basis of the record made before the agency.[11] Thereby, review can only occur in a single court of appeals; piecemeal review of a single agency order is statutorily precluded.

The court of appeals below ignored these statutory limits to its jurisdiction in order to impose its will on an administrative agency in a proceeding of interest to the court. In so doing, it granted judicial review to a party that had no statutory standing, to the prejudice of those who had properly perfected their right to judicial review before another court of appeals.

Under the decision of the court of appeals, a party seeking review of FERC orders under either the Natural Gas Act, the Federal Power Act, or the NGPA may now simply file a motion under the All Writs Act. It need not apply for rehearing before the agency; it need not

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[11] 15 U.S.C. § 3416(a)(4), *id.* at § 717r(b), 16 U.S.C. § 825*l*(b). 28 U.S.C. § 2112(a) gives the court in which exclusive jurisdiction and venue vests discretion to transfer the petition to another court of appeals where convenience of the parties or the interest of justice so requires.

await the agency's denial of the application; it need not have statutory standing to seek judicial review; it need not file a formal petition for review; and it need not await the filing of the agency record upon which review must be undertaken. Once filed, the All Writs Act motion takes precedence over all otherwise timely and proper petitions for review filed by parties having proper standing in other courts of appeals, and grants the filing party substantive review of its challenge wholly independent of the consideration of other parties' challenges. Further, by using the All Writs Act motion to effect review of the agency order, a court of appeals can evade the statutory requirements that (i) such review must be based on the record compiled before the agency, and (ii) such review of the agency's order must be undertaken by a single court of appeals.

The decision of the court of appeals, however, is not limited to those three acts administered by the FERC. Exhaustion of administrative remedies is a generally applicable principle of administrative law. Similarly applicable are the provisions of 28 U.S.C. § 2112, which invest a single court of appeals with the authority to review agency decisions on the record. Under the decision of the court of appeals, a party can secure preferential, substantive review of its particular challenge to an agency order by filing an All Writs Act motion, irrespective of the ripeness of the challenge or the potential for piecemeal review.

If this is to be the law, then all parties will, perforce, seek judicial review pursuant to the All Writs Act prior to exhaustion of their administrative remedies to ensure that their statutory right to judicial review is not foreclosed by similar motions of other parties. If the decision below is allowed to stand, it will fundamentally change the relationships among federal agencies and reviewing courts, among the various courts of appeals, and among parties before agencies. Thus, its result will have a

broad, deleterious effect on judicial review of administrative decisions generally.

Further, the court below violated the due process rights of the Producers. Producers have properly preserved challenges to the amount of refunds ordered by the FERC and have those objections pending before the Fifth Circuit. The court of appeals here granted preferential review of one party's objections to the agency's orders. Based upon that selective and limited review, the court below ordered the agency to amend its orders to require additional cash payments by Producers. Thereby, Producers were deprived of their property rights by the order of the court of appeals without a meaningful and timely opportunity to be heard in accordance with the statutory requirements on all matters relating to whether such additional cash payments should be ordered.

Finally, the court of appeals impermissibly encroached upon the discretionary authority of the FERC to structure refund plans. The court of appeals ordered the FERC, which was considering on rehearing the very objection to its order that was being urged by AGD before the court, to replace its refund procedures with a procedure that the court of appeals preferred, even though the court never had before it the complete record that the FERC had considered.

This Court should issue a writ of certiorari and review the decision below in order to maintain the integrity of the explicit statutory procedures and the continued viability of the controlling precedent relating to review of agency orders.

A. The Decision Below Conflicts With Statutory Provisions Governing Judicial Review And Well-Settled Principles Approved By This Court And The Courts Of Appeals.

Sections 506(a)(2) and (4) of the NGPA, 15 U.S.C. §§ 3416(a)(2) and (4), prescribe the procedure for ob-

taining judicial review of FERC orders issued under that Act.[12] Section 506(a)(2) provides in pertinent part:

> No person may bring an action under this section to obtain judicial review of any order of the Commission unless—
>
> (A) such person shall have made application to the Commission for a rehearing under this subsection; and
>
> (B) the Commission shall have finally acted with respect to such application.

Section 506(a)(4) then provides that judicial review is to be obtained by filing a written petition for review with an appropriate court of appeals "within 60 days after the final action of the Commission on the application for rehearing required under paragraph (2)[,]" and that "[n]o objection to such order of the Commission shall be considered by the Court if such objection was not urged before the Commission in the application for rehearing . . . ." 15 U.S.C. § 3416(a)(4).

The courts of appeals have consistently "recognized that a petition for rehearing is a jurisdictional prerequisite to judicial review of both NGPA and NGA [Natural Gas Act] claims."[13] Even the D.C. Circuit, until now,

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[12] Section 506(b), 15 U.S.C. § 3416(b), provides for judicial review of rulemaking orders like Order Nos. 399 and 399-A. Both the District of Columbia Circuit and the Fifth Circuit have held that the procedures set forth in Sections 506(a)(2) and (4) govern judicial review of such rulemaking orders. *INGAA I*, *supra*, 716 F.2d at 15; *Ecee, Inc. v. FERC*, 611 F.2d 554 (5th Cir. 1980).

[13] *Southern Union Gathering Co. v. FERC*, 687 F. 2d 87, 91 (5th Cir. 1982). *Accord, e.g., Ecee, Inc. v. FERC*, *supra*, 611 F.2d at 565-66; *Boston Gas Co. v. FERC*, 575 F.2d 975 (1st Cir. 1978); *Pan American Petroleum Corp. v. FPC*, 268 F.2d 827 (10th Cir. 1959). *See also, e.g., Utah Power & Light Co. v. FPC*, 339 F.2d 436, 437-438 (10th Cir. 1964) (construing similar provisions of Section 313 of the Federal Power Act, 16 U.S.C. § 825*l*).

has embraced this proposition of law and has recognized that it lacks jurisdiction to review a FERC order unless the petitioner has strictly observed the rehearing requirement.[14]

Unless statutory prerequisites for review have been satisfied, a court has no jurisdiction to undertake review of administrative orders. In *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965), this Court stated: "[W]here Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Accord, City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (Federal Power Act); *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497, 499 (1955) (Natural Gas Act).

In the case below, the party seeking review, AGD, had not followed the prescribed statutory procedure. Rather than first filing an application for rehearing of Order No. 399-A and waiting for the Commission to deny that application, as required by Sections 506(a)(2) and (4), AGD immediately sought judicial review under the aegis of an All Writs Act motion. It then sought agency rehearing.

Because AGD's Motion was not predicated upon an application for rehearing that had been denied by the FERC, the statutory provisions expressly precluded the court of appeals from treating AGD's Motion as a peti-

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[14] *See, e.g., Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124 (D.C. Cir. 1982); *Public Service Comm'n of N.Y. v. FPC*, 543 F.2d 757 (D.C. Cir. 1974); *Dayton Power & Light Co. v. FPC*, 251 F.2d 875 (D.C. Cir. 1958); *Michigan Consolidated Gas Co. v. FPC*, 167 F.2d 264 (D.C. Cir. 1948).

tion for review.[15] In these circumstances, both AGD's motion and its later filed petition for review were premature and jurisdictionally defective attempts to obtain judicial review of Order No. 399-A. Therefore, they "should [have been] dismissed." [16]

The statutory review procedures set out in Section 506(a) of the NGPA codify the well-established principle of administrative law repeatedly enunciated by this Court that:

> an administrative order is not "final," *for the purposes of judicial review*, until outstanding petitions for reconsideration have been disposed of. See, e.g., *Outland v. Civil Aeronautics Board*, 109 U.S. App. D.C. 90, 284 F.2d 224; *Braniff Airways, Inc. v. Civil Aeronautics Board*, 79 U.S App. D.C. 341, 147 F.2d 152.[17]

More recently, in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 541 (1970), this Court reiterated that: "[u]nless Congress provides otherwise,

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[15] The corollary of the rehearing requirement in NGPA Section 506(a)(2) is the principle set out in Section 506(a)(4) that an objection not raised or considered on rehearing may not be raised before a court of appeals on review. This Court has held that the provisions of Section 19 of the Natural Gas Act, 15 U.S.C. § 717r (the basis for Sections 506(a)(2) and (4) of the NGPA), and the related exhaustion doctrine preclude the courts of appeals from considering objections to an order that have not been presented to, and passed on by, the FERC. *FPC v. Colorado Interstate Gas Co., supra*, 348 U.S. at 498-500. The Court there held that even *sua sponte* consideration is precluded because it "would seriously undermine the purpose of the explicit requirements of § 19(b) that objections must first come before the Commission." *Id.* at 499.

[16] *California Co. v. FPC, supra*, 411 F.2d at 722; *General American Oil Co. of Texas v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969).

[17] *CAB v. Delta Airlines, Inc.*, 367 U.S. 316, 326 (1961) (emphasis in original). *Accord, FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 242-43 (1980); *FPC v. Metropolitan Edison Co.*, 304 U.S. 375, 383-386 (1938).

'[w]here a motion for rehearing is in fact filed there is no final action until the rehearing is denied.' "

Here, Congress has not provided otherwise. To the contrary, NGPA Sections 506(a)(2) and (4) specifically provide that a party may not seek judicial review until after the FERC has finally denied that party's application for rehearing.

The court of appeals attempted to validate its treatment of AGD's Motion as a petition for review by citing other cases where courts of appeals had done so. However, none of the cases cited by the court of appeals in support of its treatment of AGD's motion as a petition for review arose under a statute like the NGPA, which requires final agency action denying a party's application for rehearing as a jurisdictional prerequisite to that party seeking judicial review. Rather, because the party in each of those cases could have initiated a review proceeding under the governing statute when it filed a petition for a writ of mandamus, its mandamus petition was treated as sufficient to constitute a notice of appeal under the governing statute.[18]

Here, however, AGD could not have filed a valid petition for review when it filed its Motion. Thus, AGD's Motion under the All Writs Act could not, under the

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[18] For example, the court below cited *National Organization for Reform of Marijuana Laws v. Ingersoll*, 497 F.2d 654 (D.C. Cir. 1974) (*"NORML"*). There, a petition for mandamus filed within the time specified for seeking judicial review was treated as a petition for review under 21 U.S.C. § 877; Section 877 does not require an application for rehearing and agency action thereon as jurisdictional prerequisites to judicial review. The other cases relied upon by the court below were both criminal cases and have no possible application to review of agency determinations. *See United States v. Green*, 499 F.2d 538, 540 n.5 (D.C. Cir. 1974) (a petition for mandamus is adequate as a notice for appeal), and *Jordan v. United States District Court for Dist. of Col.*, 233 F.2d 362, 365 (D.C. Cir.), *vacated on other grounds*, 352 U.S. 904 (1956) (a petition for mandamus filed by a *pro se* criminal defendant is adequate as a notice of appeal).

cases cited by the court below, be treated as a petition for judicial review under the NGPA.[19]

In sum, the court of appeals below ignored the express statutory restrictions on judicial review under the NGPA and well-settled principles announced by this Court and the courts of appeals. A court of appeals is not free to disregard statutory procedures for judicial review, to the prejudice of petitioners who have followed such procedures, simply to impose its will upon an administrative agency in a proceeding of interest to it.[20] Whether the courts of appeals must observe explicit statutory and judicial principles governing judicial review of agency orders is an issue appropriate for this Court's consideration.

B. The Action Of The Court Of Appeals Results In Piecemeal Review Of The Same Agency Order In Different Courts Of Appeals, In Contravention Of The Statute And The Interests Of Judicial Economy.

Section 506(a) of the NGPA establishes a procedure whereby FERC orders properly subject to judicial review are reviewed on the record by a single court of appeals. This statutory scheme for effecting orderly statutory review is complemented by the venue provisions of 28 U.S.C. § 2112(a). The decision of the court of appeals

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[19] *Cf. American Public Gas Ass'n v. FPC*, 555 F.2d 852 (D.C. Cir. 1976). There, the court below recognized the limitations on treating a petition for a writ of mandamus as a petition for review. The court held that a mandamus petition filed by a party prior to denial by the agency of its application for rehearing could not be treated as a petition for judicial review for purposes of 28 U.S.C. § 2112(a) in determining the first filed petition for judicial review under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). Thus, under that court's own precedent, AGD's Motion could not be treated as the equivalent of a petition for review.

[20] That the issue presented was whether the FERC had complied with the court's earlier mandate in *INGAA I* did not relieve AGD of the statutory rehearing requirements. *Cf. Department of Fish and Game v. FPC*, 359 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 932 (1966).

below violated the mandatory requirements of both statutory provisions.

Section 506(a)(4) grants the court of appeals in which the agency record is filed *exclusive* jurisdiction and venue to review that order. Under 28 U.S.C. § 2112(a), the agency, in the first instance, must file the record in that court in which the first timely petition for judicial review of the agency's order was filed. The record must include the "order sought to be reviewed" and the pleadings, evidence, and other documents filed with the agency. 28 U.S.C. § 2112(b) (1982).

The courts of appeals, including the court of appeals below, have recognized "the importance of avoiding judicial review of 'piecemeal proceedings' and having 'one comprehensive judicial review proceeding, based on a full record.'" *Cities of Anaheim and Riverside v. FERC*, 692 F.2d 773, 779 (D.C. Cir. 1982). *Accord, Pennzoil Co. v. FERC*, 742 F.2d 242 (5th Cir. 1984). Indeed, the procedure for judicial review crafted by Congress in NGPA Section 506(a) and 28 U.S.C. § 2112(a) precludes piecemeal review of a single agency order. Yet the decision of the court of appeals in this case compels such piecemeal review, in direct contravention of the statutorily prescribed procedure and applicable precedents.

The first petition for review of Order Nos. 399 and 399-A was filed in the Fifth Circuit. The objections of the Producers to those orders are still pending before that court. Nevertheless, the D.C. Circuit undertook judicial review of only the objections raised by AGD to only one aspect of the refund orders without affording Producers any opportunity to argue the merits of their objections on appeal, and without undertaking any review on the basis of the agency record. Thereby, as a matter of law, the court of appeals violated the provisions of Section 506(a) of the NGPA and of 28 U.S.C.

§ 2112(a). Thus, as Judge Scalia observed in his dissent (App. 135a):

> The majority's action frustrates the Congressional policy of preventing piecemeal review and placing review in the court of first filing. If we do not dismiss this case as a meritless petition for mandamus (as we should), we must transfer the so-called appeal to the Fifth Circuit.

The piecemeal review compelled by the action of the court of appeals also violates fundamental policy considerations crucial to the administration of cases by the federal courts. Three basic objections have been presented to Order Nos. 399 and 399-A by different petitioners—or "deemed" petitioners such as AGD. The first objection to the orders, raised by Pitts Oil Company, is the question of whether refunds should have been ordered by the FERC at all. The second objection, raised by Producers, is whether the FERC has correctly determined, *as a matter of law*, the amount of refunds due.[21] The third objection, raised by AGD, is whether, assuming the amount of refunds determined by the FERC to be due is correct the method of payment for those refunds established by the FERC is appropriate—*i.e.*, the offset issue.

In an orderly review proceeding before a single court of appeals, the first objection would be decided, then the second, then the third. This order is required because a decision on the second and third objections could be rendered unnecessary if the first objection is sustained. Similarly, in the circumstances here presented, sustaining the objections of the Producers could largely, if not totally, moot the third objection.

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[21] Producers have challenged the legality of FERC's refund calculation. Section 504 of the NGPA, 15 U.S.C. § 3414 (1982), prohibits the FERC from ordering refunds of amounts collected which do not exceed the applicable maximum lawful price, plus all allowed adjustments and add-ons. Producers in their challenge have raised the issue of whether the FERC has attempted to order such repayments here.

The result is that the decision of the court of appeals below may be nothing more than an advisory opinion, depending upon the Fifth Circuit's resolution of the first two objections. At the same time, the court's decision could taint the review proceedings before the Fifth Circuit because the D.C. Circuit already has determined that refunds are to be made in cash, perhaps thereby implicitly predetermining the Fifth Circuit's consideration of the first two issues.[22] This situation has been aggravated now that the FERC has, in light of the D.C. Circuit's opinion, granted AGD's request for rehearing and ordered immediate cash payments, plus interest, by Producers.

The rendering of such an advisory opinion, particularly in light of its potentially prejudicial impact on another court's consideration of the remaining merits of the case, not only is inconsistent with sound principles of judicial administration but also violates the "case or controversy" requirements of Article III of the Constitution.[23] By comparison, effecting review of all objections to an order of the FERC before a single court of appeals in conformance with the requirements of Section 506(a) of

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[22] In their "Application for a Stay of Enforcement of a Judgment of the United States Court of Appeals for the District of Columbia Circuit" filed with Chief Justice Burger on May 23, 1985, in No. A-885, Producers argued that the decision of the court of appeals could foreclose their right to obtain judicial review on their objections at all. In response, as well as in subsequent pleadings filed with the Fifth Circuit, AGD argued that the D.C. Circuit's decision had not foreclosed Producers' opportunity to present their objections on appeal to the Fifth Circuit. If so, this is the very type of piecemeal review proscribed by the statutes. However, if AGD is wrong in its assertions, then a fundamental denial of Producers' due process rights has occurred. *See* Part C, *infra*.

[23] *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) (jurisdiction of federal courts is limited to cases which present "a real and substantial controversy admitting of relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts"). *See Buckley v. Valeo*, 424 U.S. 1, 13 (1976); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

the NGPA and 28 U.S.C. § 2112(a) eliminates any potential violation of either sound judicial policy or the Constitution.

C. The Action Of The Court Of Appeals Denied Producers Due Process Of Law.

The Due Process Clause of the Fifth Amendment guarantees all persons an opportunity to be heard at a meaningful time and in a meaningful manner before being deprived of any property right.[24] This Court only recently reiterated that "the root requirement" of due process is a meaningful opportunity to be heard before being "deprived of any significant property interest." [25] Moreover, as the D.C. Circuit has noted, where statutory or regulatory procedures designed to afford timely and meaningful review are in place, due process requires "scrupulous compliance" with those procedures.[26]

As previously set out, the court of appeals did not follow the procedures prescribed in Section 506 of the NGPA and 28 U.S.C. § 2112(a) for review of FERC orders. This failure to observe statutorily mandated procedures governing judicial review has infringed upon Producers' Fifth Amendment right to secure *meaningful* and *timely* review of Order Nos. 399 and 399-A.[27]

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[24] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970).

[25] *Cleveland Board of Education v. Loudermill*, —— U.S. ——, 105 S.Ct. 1487, 1493 (1985).

[26] *Mazaleski v. Treusdell*, 562 F.2d 701, 719 (D.C. Cir. 1977).

[27] Whether due process rights have been violated frequently involves an *ad hoc* balancing of private and governmental interests, weighing the procedural protections that may be afforded to substantive private interests against the costs such protections would impose upon governmental interests. *See Mathews v. Eldridge, supra*, 424 U.S. at 335-36. However, in enacting Section 506 of the NPGA, Congress itself has weighed the competing interests and has declared that specified statutory procedures are required to protect the procedural interests of litigants, agencies and reviewing courts. Therefore, this Court should not countenance any departure from this statutory scheme.

The court of appeals attempts to gloss over this denial by baldly asserting that "because the parties to the instant case have amply addressed the merits, no one will be prejudiced by considering Associated Gas Distributors' motion to enforce the mandate as a petition for review." App. 11a. However, this attempt must fail.

Pending before the court was a motion under the All Writs Act claiming that Order No. 399-A violated the mandate of the court of appeals in *INGAA I*. The Producers and others—including the FERC—responded and opposed AGD's Motion, arguing that relief under the All Writs Act did not lie. The focus of the legal issues addressed by such response was substantively different from the legal issues that would have to be briefed under Section 506(a) of the NGPA in determining whether the FERC order must be sustained under standards governing review of agency orders.[28] Indeed, the limited focus of the motion papers is underscored by the fact that the court of appeals never had before it the full agency record, precluding by definition substantive review on that record as required by NGPA Section 506(a)(4).[29]

Further, the fundamental fairness required by due process was not afforded Producers by reviewing only the

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[28] *Compare United States ex rel. McLannan v. Wilbur*, 283 U.S. 414, 420 (1931) (setting out the standards for obtaining All Writs Act relief) *with Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983), and *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962) (setting out general standards for review of agency orders).

[29] In *NORML*, relied upon by the court below as supporting the proposition that a "petition for mandamus can do service as a petition for review" (App. 11a), the court of appeals treated a petition for mandamus as sufficient to effect an appeal only after first denying mandamus and ordering *further* consideration of the motion as a petition for judicial review. *NORML*, 497 F.2d at 656 n.3, 660. Thus, the court of appeals there implicitly acknowledged what it here refuses to admit: consideration of mandamus papers is not adequate to dispose of a case on the merits.

objection of one party to the FERC's order. Based on this selective review, the court of appeals required the FERC to amend its orders and to provide for additional cash refunds in lieu of offsets. Producers were given no meaningful opportunity to be heard at that time on their objections, which if sustained would largely negate, if not totally eliminate, the basis for an order for additional refunds by them of some $450 million. In denying Producers a timely opportunity to be heard, the court of appeals deprived them of their property rights without due process of law.

Accordingly, the decision of the court of appeals requiring Producers and others to make cash payments in lieu of offsets, without affording Producers any opportunity to be heard at a meaningful time and in a meaningful manner in accordance with the statutory requirements of Section 506 of the NGPA and 28 U.S.C. § 2112(a), constituted a denial of their fundamental due process rights in contravention of the Fifth Amendment.

D. The Court Of Appeals Failed To Defer To The FERC's Discretionary Authority To Fashion Refund Procedures.

The court of appeals could not have issued a writ of mandamus in the instant case. This is not an instance where the court of appeals, in harmless error, simply misnamed the action that it was taking. Rather, seeing that mandamus did not properly lie, the court improperly attempted to secure the same result indirectly by vacating FERC's Order No. 399-A offset provisions under a "deemed" petition for judicial review. However, without regard to whether the court's action is viewed as arising under the All Writs Act or under a petition for review, the court impermissibly intruded upon the broad discretion of the FERC to devise refund remedies.

1. *Mandamus did not lie.*

This Court has held that a writ of mandamus will not issue when the person to whom the writ is to be directed

has discretion to act.[30] The writ cannot be used to compel adoption of a particular remedy when the agency possesses broad discretion to determine what remedy, if any, is appropriate.[31] Because nothing in *INGAA I* either directed the FERC to order refunds or established the method for effecting any refunds ultimately ordered by the FERC, resort to mandamus was legally precluded.

Congress has invested in the FERC broad discretionary authority to regulate the natural gas industry. As this Court stated in *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968):

> [T]he breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.

This Court has affirmed that FERC's discretion is equally broad in the specific context of its power to fashion appropriate procedures to effect the manner and timing of refunds.[32]

As observed by Judge Scalia in his dissent, AGD's request for mandamus was without merit because the FERC "retains discretion to determine both the amount and the manner of the refund." App. 133a. Nothing in

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[30] *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661-662, 665-666 (1978); *Kerr v. United States District Court*, 426 U.S. 394, 402-403 (1976); *Will v. United States*, 389 U.S. 90, 95-96 (1967).

[31] *See, e.g., United States ex rel. McLannan v. Wilbur, supra*, 283 U.S. at 420 ("the writ of mandamus cannot be made to serve the purpose of an ordinary suit. It will issue only where the duty to be performed is ministerial and . . . plainly defined. The law must not only authorize the demanded action but require it; the duty must be clear and indisputable.").

[32] *See, e.g., Mobil Oil Corp. v. FPC*, 417 U.S. 283, 314-17 (1974) (FPC has great flexibility in ordering refunds; refund workoff credit procedure is within agency discretion.). *See also Estate of French v. FERC*, 603 F.2d 1158, 1162-63 (5th Cir. 1979) ("FERC is to explore and give due weight to considerations of equity when imposing refund obligations.").

INGAA I abridged this discretion. Accordingly, mandamus did not lie.

2. *The court of appeals substituted its judgment for that of the agency.*

This Court has admonished the reviewing courts that they may not "substitute [their own] judgment for that of the agency." *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). As this Court emphasized in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978), the reviewing court must "not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." Further, this Court has specifically emphasized the FERC's discretion to design appropriate refund procedures. *Mobil Oil Corp. v. FPC, supra*, 417 U.S. at 314-17.

By comparison, the court below ignored the admonition of this Court and, without foundation, intruded into the discretion reserved to the FERC by ordering that the FERC implement a refund remedy preferred by the court of appeals, which the FERC has now done in Order No. 399-B. This unfounded intrusion into the expertise of the FERC is even more egregious when considered in light of the absence of the full agency record before the court of appeals.

Because the court of appeals did not follow the orderly, statutorily mandated procedures set forth in Sections 506(a)(2) and (4) of the NGPA and *sua sponte* treated AGD's Motion as a petition for review, the record compiled before the FERC was never filed with the court of appeals. Judicial review *on the complete record compiled before the FERC* is required by Section 506(a)(4), which provides that "[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive," and by 28 U.S.C. § 2112(b). Because the agency record had not been filed with it,

the court of appeals had no basis for determining the propriety of the FERC's orders.

Of equal importance, by failing to have the complete record before it, and by failing to allow full briefing of all relevant objections and issues, the court of appeals resolved the issue of how refunds were to be undertaken without first determining the legal validity of the refunds ordered.[33] Thereby, the court's decision was rendered in a vacuum without consideration of the significant legal issues that had to be addressed before the validity of the FERC's offset mechanism could ever be reached.

Accordingly, a writ of certiorari should issue in this case to preserve the proper equilibrium between the authority of FERC and that of the court of appeals. This balance must be maintained to prevent the intrusion of the court of appeals into matters squarely within the expert discretion of administrative agencies.

CONCLUSION

Petitioners respectfully urge that a petition for writ of ceritorari be granted and that the decision of the court of appeals be vacated and remanded, with instructions to transfer the case to the United States Court of Appeals for the Fifth Circuit.

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[33] *See* n. 21 & accompanying text, *supra*.

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SUPPLEMENTAL APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa and Charles G. Stalon.

Docket Nos. RM84-6-015 through RM84-6-028

REFUNDS RESULTING FROM BTU MEASUREMENT ADJUSTMENTS

ORDER NO. 399-B

ORDER ON DIRECTION OF THE COURT VACATING, IN PART, ORDER NO. 399-A, AND ON PETITIONS FOR REHEARING AND RECONSIDERATION

(Issued July 18, 1985)

I. INTRODUCTION

The Federal Energy Regulatory Commission (Commission) is implementing the court's decision in *Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission*,[1] by vacating the offset mechanism required by Order No. 399-A [2] and by granting five petitions for rehearing. The Commission otherwise denies all other petitions for rehearing, reconsideration and stay of Order No. 399-A.

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[1] Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, 756 F.2d 166 (D.C. Cir. 1985) (INGAA-II).

[2] Refunds Resulting from Btu Measurement Adjustments, 49 Fed. Reg. 46,353 (Nov. 26, 1984).

II. BACKGROUND

On November 20, 1984, the Commission issued Order No. 399-A, which granted rehearing in part of Order No. 399.[3] Order Nos. 399 and 399-A implemented the decision of *Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission*[4] by establishing refund procedures for overcharges resulting from adjustments to the calculation of the Btu content of gas sold under the Natural Gas Policy Act of 1978 (NGPA). On March 5, 1985, the United States Court of Appeals for the District of Columbia directed the Commission to vacate the portion of Order No. 399-A that required first sellers to offset Btu refunds against costs permitted under section 110 of the NGPA.[5] Order No. 399-A also permitted first sellers to seek a waiver of that portion of a first seller's refund obligation to the extent it is attributable to royalty interest owners and is uncollectible. The Commission received nine timely petitions for rehearing of Order No. 399-A.[6]

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[3] Refunds Resulting from Btu Measurement Adjustments, 49 Fed. Reg. 37,735 (Sept. 26, 1984) (issued Sept. 20, 1984) (Final Rule).

[4] 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1616 (1984) (INGAA-I) (charges for gas must be determined by measurement of Btu's (British thermal units) under "wet" conditions rather than the "as delivered" basis promulgated by the Commission).

[5] *See* n.1, *supra*. 18 C.F.R. § 271.1104(e) (1984); *see generally*, Regulations Implementing Section 110 of the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act, 48 Fed. Reg. 5152 (Feb. 3, 1983) (Order No. 94-A) (Final Rule and Order on Rehearing of Order No. 94). Appeal pending *sub nom.*, Texas Eastern Transmission Corp., *et al.* v. Federal Energy Regulatory Commission, No. 83-4390 (argued March 8, 1985, 5th Cir.).

[6] American Paper Institute, Inc., Industrial Users (*i.e.*, Process Gas Consumers Group and American Iron & Steel Institute), Florida Cities, Pitts Oil Company, *et al.*, Stauffer Chemical Company, Associated Gas Distributors, Memphis Light, Gas & Water Division, BTA Oil Producers, and a group of Indicated Producers.

The Commission also received five requests for an extension of the deadline for large first sellers to make refunds and a request to

III. DISCUSSION

A. *The Court's Decision Prohibiting the Offset of Section 110 Allowances*

The Court of Appeals quoted with approval the Commission's rationale in Order No. 399 for disallowing the offset of Btu refund obligations and section 110 charges. The court directed the Commission to vacate the offset portion of Order No. 399-A.[7]

As required by Order No. 399-A, many first sellers offset hundreds of millions of dollars of Btu refund obligations against uncontested section 110 charges in payment of Btu refunds. The Commission is now reversing that order, consistent with the instructions of the United States Court of Appeals.[8] Those first sellers that paid the Btu refund obligation by offsetting section 110 charges must now pay the Btu refund obligation in full.[9]

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modify the refund procedures. The Commission did not extend the deadline, or modify the refund procedures, because the petitions failed to present sufficient grounds for an extension.

In addition, five petitioners sought a stay of Order No. 399-A. These requests were not granted because the Commission did not believe "justice so require[d]," 5 U.S.C. § 705 (1982).

[7] INGAA-II, *supra*, at 171. The American Paper Institute, Industrial Users, Florida Cities, the Associate Gas Distributors and Stauffer Chemical Company objected to the requirement that first sellers' undisputed billings to pipeline-purchasers for section 110 allowances be offset against the first sellers' Btu refund obligation. Since the Court of Appeals' decision has afforded these petitioners the relief they sought in their petitions for rehearing, the Commission grants these petitions.

[8] The mandate issued May 20, 1985, the date of the Court of Appeals denial of the "Indicated Producers" motion for a stay. On June 3, 1985, Chief Justice Burger denied a petition for stay of the mandate.

[9] This refund payment may be in the form of one or more cash payments, or in the form of billing adjustments (if such billing adjustments are agreed to by the first seller), or a combination of these methods, as long as full payment is made by August 30, 1985.

Refunds must be made by August 30, 1985.[10] In all cases, interest accrues on the amount to be refunded until the date of payment, in accordance with Order No. 399.[11] In addition, interstate and intrastate pipelines are required to file refund reports similar to those required in Order Nos. 399 and 399-A. These additional reports are necessary to better monitor the payment of refunds by first sellers and interstate pipelines.

B. *Refund Obligations Attributable to Royalty Interest Owners*

Memphis Light, Gas and Water Division, (Memphis) protests the Commission's assertion of authority in Order No. 399-A to waive payment by first sellers of that portion of a Btu refund obligation attributable to royalty interest owners that is uncollectible. Memphis argues that the Commission lacks authority to waive the imposition of strict liability for the refund on first sellers. Alternatively, Memphis argues that there is no reason to waive this refund obligation because it derives from a first seller's payment of excessive royalties.

In Order No. 399, first sellers were made guarantors of payment of the portion of the Btu refund obligation attributable to royalty interest owners, primarily because the first seller, not royalty interest owners, collected

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[10] The disallowance of offsets does not affect the right of first sellers to defer payment of that portion of the Btu refund obligation attributable to royalty interest owners until actually collected or until November 5, 1986, whichever occurs first.

[11] The Indicated Producers argue that pipelines should pay the same interest rate on section 110 charges as the interest rate applicable to the Btu refunds. This issue is also mooted by the decision in INGAA-II because Btu refunds must be paid separately and distinct from section 110 charges. In any event, the interest rate applicable to Btu refunds was set by the Commission based upon public policy considerations. In contrast, the interest rate for section 110 charges is set by contract. For this reason, these interest rates may differ.

prices in excess of NGPA ceiling prices. On review, the Commission still believes it has discretion to waive payment of those portions of the refund obligation attributable to royalty interest owners, if the first seller demonstrates that the refund is uncollectible.[12] As stated in Order No. 399-A, the Commission will consider requests for a waiver on a case-by-case basis.[13]

C. *Responsibility of Operators*

Order No. 399 designated the operator as the one responsible for repayment of the entire refund for the time period it operated a well.[14] Specifically, the order required operators to notify all of the working interest owners of their refund obligations and to collect the refunds and pay them over to the pipelines. In addition, the Commission required operators to pay refunds owed by a defaulting working interest owner.

The Indicated Producers complain about the imposition of strict liability on a first seller that is the operator of a well for those refunds that are attributable to other working interest owners. They argue that an operator should not have to serve as a guarantor of refunds from other working interest owners that default on their portion of the refund.

The Commission recognizes that each working interest owner is a first seller and individually liable for the refund attributable to its interest in a well during the time the refund obligation accrued, as well as that portion of its refund obligation attributable to royalty interest owners. But, after further consideration of the issue, the Commission still believes it is necessary to designate

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[12] *See* Consumer Federation of America v. FPC, 515 F.2d 347, 359 (D.C. Cir. 1975).

[13] As established in Order No. 399-A, to the extent a filing fee exists for such a waiver, the Commission is waiving this filing fee.

[14] 49 Fed. Reg. 37,735, 37,740 (Sept. 26, 1984).

the operator as the one responsible for the payment of the entire refund for the time period that the operator operated a well in order to facilitate expeditious refunds as required by the court in *INGAA-I* and *INGAA-II*.

D. *Other issues*

Pitts Oil Company, Sage Energy Company, and Clayton W. Williams, Jr., Co. filed a petition requesting reconsideration of the same issues on which they sought rehearing of Order No. 399, asserting that Order No. 399-A and its predecessors failed to articulate a reasoned explanation for requiring refunds to implement the court's decision in *INGAA-I*.

As discussed in Order No. 399-A, the Commission believes that substantial equitable considerations support a discretionary order of refunds. Primarily, the consumers who paid excessive gas prices because of the incorrect measurement of the Btu content of that gas should benefit through the refund of overcharges. In any event, the opinion of the Court of Appeals in INGAA-II leaves no doubt that refunds were required to implement that Court's earlier decision in INGAA-I.[15]

To the extent petitioners have raised issues other than discussed above, the Commission believes those issues were previously considered and fully addressed in prior orders in this proceeding.

IV. EFFECTIVE DATE AND CLEARANCE BY THE OFFICE OF MANAGEMENT AND BUDGET

The refund reporting requirements established in this rule are information collection requirements under the Paperwork Reduction Act [16] and subject to Office of Management and Budget (OMB) approval.[17] Hence, the re-

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[15] INGAA-II, *supra* at 171.

[16] 44 U.S.C. §§ 3501-3520 (1982).

[17] 5 C.F.R. Part 1320 (1985).

porting requirements established in paragraph (F) below and § 154.38(h)(3)(viii) of the Commission's regulations are effective [insert date that is sixty days after publication in the *First Register*]. If OMB clearance has not been received by this effective date, the Commission will issue a notice temporarily suspending the effective date of the refund reporting requirements. The remaining portions of this order are effective [insert date that is thirty days after publication in the *Federal Register*].

V. THE COMMISSION ORDERS:

(A) That portion of Order No. 399-A that required the offset of Btu refund obligations and section 110 charges is vacated, and those petitions for rehearing that requested this relief are granted.

(B) First sellers must make refund payments for those amounts of Btu refund obligations that were previously paid by means of offsetting section 110 charges, by August 30, 1985, in accordance with Order No. 399.

(C) The parties to the first sale transaction may choose the method of payment of this refund, except that pipelines and first sellers may not offset Btu refunds and production-related costs permitted under section 110 of the NGPA. Those pipelines that have already begun to collect refunds by using billing adjustments without the consent of the seller can continue this method of payment only if the seller agrees. If the parties cannot agree, payment must be made in a lump-sum cash payment.

(D) Interest on Btu refunds must be calculated in accordance with §§ 154.102(c) and (d) of the Commission's regulations, except that any interest on money paid into escrow is the actual interest accrued in the escrow account on the amount required to be refunded.

(E) Any filing fee applicable to a request for a waiver, as described herein, is waived.

(F) By October 15, 1985, interstate and intrastate pipelines must file a refund report with the Commission detailing (1) the first sellers that made refunds, the refunded amounts that each pipeline has received, separately stated for each first seller, and indicating the principal amount and interest; and (2) the first sellers that have not made refunds, and the refund amounts due but not received by the pipeline, for each first seller, separately stating the principal amount and interest due from each first seller and the reason for nonpayment. Intrastate pipelines must file a copy of this report with the state regulatory agency having jurisdiction over such pipeline.

(G) All other petitions for rehearing, reconsideration, extension of time, and stay of Order No. 399-A are denied.

(H) In consideration of the foregoing, Part 154, Chapter I, Title 18, of the *Code of Federal Regulations*, is amended as set forth below.

List of Subjects: 18 C.F.R. Part 154

Natural gas

By the Commission.

(SEAL)

/s/ Kenneth F. Plumb,
KENNETH F. PLUMB,
Secretary.

1. The authority citation for Part 154 continues to read as follows:

AUTHORITY: Department of Energy Organization Act, 42 U.S.C. §§ 7101-7352 (1982); Executive Order 12,009, 3 C.F.R. 142 (1978); Administrative Procedure Act, 5 U.S.C. §§ 551-557 (1982); Natural Gas Act, 15 U.S.C. §§ 717-717w (1982); Federal Power Act, 16 U.S.C. §§ 791a-828c (1982); Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 (1982); Public Utility Regulatory Policies Act, 16 U.S.C. §§ 2601-2645 (1982); Interstate Commerce Act, 49 U.S.C. §§ 1-27 (1976).

2. In § 154.38(h), paragraph (h)(3)(viii) is redesignated as paragraph (h)(3)(ix), and a new paragraph (h)(3)(viii) is added to read as follows:

§ 154.38 *Composition of rate schedule.*

* * * *

(h) *Pipeline recovery of Btu measurement adjustments.*

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(3) * * *

(viii) The pipeline must submit, not later than October 15, 1985, a refund report describing, for each source from which Btu refunds are obtained, those refunds received or paid (including deferred amounts paid) since filing the report under paragraph (h)(3)(vii) of this section. For those refunds subject to this paragraph, this report should show all the information enumerated in paragraph (h)(3)(vi).

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3. In § 154.38(h), newly-redesignated paragraph (h)(3)(ix) is amended by removing the phrase "paragraphs (h)(3)(vi) and (vii)", and inserting, in its place, the phrase "paragraphs (h)(3)(vi), (vii), and (viii)".